

Zoning Board of Appeals
Minutes
January 3, 2022

A meeting of the Zoning Board of Appeals (ZBA) was held via the Zoom Web Conferencing Service on January 3, 2022 at 7:00 pm.

Present: Mark Jones, William Byron, Ernest Dodd and David Hartnagel
Associate Members: Andrew DeMore, Leonard Golder and Michael Naill

Absent: Associate Member Ruth Sudduth

The Meeting was called to order at 7:00 pm

Minutes

December 6, 2021 -

Andrew DeMore noted that he has minor edits of no substance to the minutes and will forward to Karen Kelleher to make the changes.

Ernest Dodd moved to approve minutes of the December 6, 2021 meeting as amended. The motion was seconded by Andrew DeMore and carried by a roll call vote of five in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Associate Member Andrew DeMore).

December 16, 2021 -

Ernest Dodd suggested holding off on approval of the December 16, 2021 meeting as the electronic document forwarded to members was in draft form. Karen Kelleher noted it appears the wrong document was attached to the email and will include the final document on next month's agenda.

Public Hearing, 122 South Acton Road Special Permit (Volume III, Page 154)

Members participating in this hearing: Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Associate Member Andrew DeMore

The meeting was called to order at 7:10 PM

Ernest Dodd moved to waive the reading of the Notice of Public Hearing. The motion was seconded by David Hartnagel and carried by a roll call vote of five in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Associate Member Andrew DeMore).

Nicholas Hatch, Owner/Applicant explained that they propose to install an above ground pool with a deck on the front portion of their lot. Because the lot is non-conforming as to size and frontage, the Building Commissioner advised they need a Special Permit. They included a plot plan in their application that is based on a survey filed with the Building Department a few years ago. He noted that the proposed location meets the property line setback requirements of the current Zoning Bylaw.

Nicholas Hatch further explained that they do not have a contractor in place as pool vendors they contacted advised that the product and pricing is not available at this time. Although they do not have the final design, they wanted to get the permitting in place for when the product and contractor is available. They anticipate a 400 sq. ft. pool with a deck halfway around.

Nicholas Hatch noted that they received a copy of the letter from their neighbors and responded.

Abutters Ulrich Thomann and Nichole Strange-Thomann, 128 South Road were present. Ulrich Thomann noted concern that because their property is downhill, there could be slow seepage into the ground. He noted that happened on a parcel in New Hampshire and the trees died. He also noted that their property is downgradient, and they are concerned that their well might be impacted if the pool is filled from well water. He asked who controls the well water usage. He also questioned why the pool is proposed in front of the house and not towards the woods behind the house.

Nicholas Hatch explained the proposed location for the pool is the most convenient for access and there is a right-of-way on the property which also limits the location for a pool. They have no interest in pulling water from the well to fill the pool. The water will be brought in, and the water remains in the pool year-round, therefore there would be no emptying and refilling process.

Ernest Dodd said he is concerned about the slope of the property toward the house and asked about the grading around the pool and if it is possible to grade so as not to impact the homes. He suggested that the ZBA visit the site before closing the hearing.

Nicholas Hatch said the steepest grade declines toward the center of his property. His home is at the lower elevation. If anything came out, it would go toward their own house and not 128 South Acton Road. He noted that there is quite a grade change to the back side of their property. The groundwater is more than 20-30 feet down from the surface. The soil is basically sand and gravel.

Nicholas Hatch asked about the permitting process for a pool on a conforming lot. Mark Jones said typically it would be handled by the Building Department, however the ZBA has wide discretion on Special Permits for non-conforming lots. The Board can take into consideration issues that typically are not the same as a building for a conforming lot.

William Byron said he wonders about the proposed location because there appears to be quite a slope toward South Acton Road. He would appreciate a site visit. He believes, in general, a pool necessitates a site visit. Nicholas Hatch said he believes proposed location is approximately 65-70' from the road.

David Hartnagel asked if the right-of-way goes across the property. Nicholas Hatch responded yes; it apparently goes to farmhouse at the end of Tuttle Lane through a lot behind them. He believes the right-of-way might be abandoned as it is not used. Because the right-of way cuts across the back corner of their property it blocks a lot of consideration as to where the pool could be located. William Byron said it would be interesting to find out the status of the right-of-way. It was noted the document posted on the website shows the right-of-way from South Acton Road, through Bruce Fletcher's lot to the farmhouse on Tuttle Lane.

David Hartnagel asked about the current use of the area they propose to locate the pool. Nicholas Hatch there is a play structure located in that area, otherwise it is open.

Ernest Dodd suggested scheduling a site visit to check the slopes and to finish up public hearing at the next meeting. Abutter Ulrich Thomann agreed that the Board should schedule a site visit as their concerns remain the same.

Leonard Golder asked if the owner knows the degree of the slope toward the road. The owner said he doesn't know off hand, but it is pretty steep toward the road, beginning approximately 15' from the Road.

Members agreed to a site visit Friday morning at 10:30 am.

Ernest Dodd moved to continue the Public Hearing to February 7, 2022 at 7:40 pm. The motion was seconded by Andrew DeMore and carried by a roll call vote of five in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Associate Member Andrew DeMore).

Public Hearing Continuance, 51 Hale Road – (Volume III, Page 846 and 847)

Members participating in the public hearing: Mark Jones, William Byron, Ernest Dodd, Andrew DeMore and David Hartnagel.

The Public Hearing continuance from September 20, 2021, October 4, 2021 and November 1, 2021 was called to order. Ernest Dodd noted that the Applicant requested that the Public Hearing be continued without testimony to February 7, 2022 to allow time to prepare for the hearing.

Andrew DeMore moved to continue the public hearing without testimony to February 7, 2022 at 8:00 pm. The motion was seconded by Ernest Dodd and carried by a roll call vote in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel, and Associate Members Leonard Golder, Andrew DeMore and Michael Naill)

FY2023 Budget

Karen Kelleher presented a proposed budget for FY2023.

Although the Town Administrator's recommendation is for an increase of no greater than 3%, the draft proposed budget is significantly higher based on the overall increase in number of filings, costs, and the anticipated 3 Comprehensive Permit Applications for the Stow Acres property.

Expenses, primarily legal notices and postage, is increased to reflect the increase in rates as well as the volume of applications. As of December, the number of applications exceeded the total number of filings in 2021. A line-item transfer was approved to get through this month; however, request for Reserve Fund Transfer for both line items is necessary to get through FY22.

The salary (wages) line item reflects a 3% COLA and step increase as proposed by the Town Administrator as well as an increase in number of hours. The FY 2022 budget was based on an average of 15 hours per week. The propose FY2023 budget is based on an average of 20 hours per week.

Andrew DeMore cautioned that the budgeted hours should be sufficient for the actual hours worked. Karen Kelleher noted it is based on an average of 20 hours per week. Some weeks will be less, and some will be more.

Ernest Dodd questioned the need for a legal budget. Karen Kelleher said that is typically covered under the Select Board's budget. Mark Jones noted he spoke with the Town Administrator and apprised her that she should plan for the legal budget to include the Comprehensive Permits.

Andrew DeMore moved to approve the proposed FY2023 budget as discussed. The motion was seconded by Andrew DeMore and carried by a roll call vote in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Associate Member Andrew DeMore).

Zoning Discussion with the Building Commissioner/Zoning Enforcement Officer.

Mark Jones said he distributed a map prepared by Assistant Town Planner showing lots that are less than 1 ½ acres. Mark Jones explained that he asked that the map be prepared for purposes of this evening's zoning discussion concerning non-conforming lots.

Leonard Golder said he was surprised to see how many non-conforming lots there are.

Mark Jones noted that the Board could consider changes to the Zoning Bylaw such as creating other district areas such as Circuit Drive, Harvard Acres and Pine Point Road. He anticipates this conversation would involve more than one meeting before making a recommendation to the Planning Board for a Zoning Bylaw change.

Members then discussed the policy of when the Building Commissioner refers proposed building permits to the ZBA for a Special Permit under Section 3.9 (Pre-existing Non-conforming Uses) of the Zoning Bylaw.

Building Commissioner Frank Ramsbottom said that he has always taken a tight approach to nonconformity. His stance comes from court cases that have come down over the last 10 or so years. Based on those court decisions, he has been sending a lot to the ZBA for a Special Permit. He recently reached out to Town Counsel who mentioned another recent case that allowed for more discretion by Building Commissioners indicating that if the proposed work is within the setback and you're not increasing a non-conformity, a building permit could be issued without the benefit of a Special Permit. She did advise that he should be cautious of very large additions and specifically mentioned that swimming pools, specifically above ground pools which are considered temporary structures, may not be an issue to be referred to the ZBA for a Special Permit.

Mark Jones said the Board cannot tell the Building Commissioner when to and when not to refer something to the ZBA. He asked that Frank Ramsbottom provide copies of the court decisions. Frank Ramsbottom agreed that he will forward the court decisions when received from Town Counsel.

Frank Ramsbottom said generally he thinks it is better to ask for a Special Permit but understands there are minor things. Karen Kelleher asked if Frank Ramsbottom specifically spoke with Town Counsel about Section 3.9 that gives authority to the Building Inspector to issue a building permit without the need for a special permit provided that the proposed alteration, extension or structural change itself conforms to the requirements of the present Bylaw and does not intensify any existing nonconformities or result in any additional non-conformities. Frank said he did discuss that section of the bylaw with Town Counsel.

Frank Ramsbottom said he feels better now that there is recent case law that gives him authority to not require a Special Permit. The question is, to what extent is Stow is comfortable with, noting that when any bylaw is written it is hard to cover every issue.

Mark Jones said he feels it would be helpful for the ZBA to provide guidance to the Building Commissioner on when they feel comfortable with issuing a Building Permit vs. sending it to the ZBA for a Special Permit.

Ernest Dodd said he feels a swimming pool is a major structure and a Special Permit should be required. He said a second story is different as long as it stays within setback. Frank noted that if someone wants to add a dormer on a small lot on Lake Boon, vs. a lot that is an acre could make a big difference.

Mark Jones said on several occasions, he recommended to the Planning Board that it would be helpful to have a Floor Area Ratio requirement.

Leonard Golder noted that the community standard as to what is acceptable to residents has changed over the past twenty years.

William Byron noted that quite a few years ago the ZBA discussed this same issue because so many applications were coming to the ZBA and the ZBA thought there were situations where the Building Commissioner could issue a permit. Different Building Commissioners have looked at this issue differently.

William Byron said when someone is enlarging deck but not moving creating or expanding a non-conforming setback, he thinks the Building Commissioner could approve.

Members discussed whether, in some instances, it is unfair that the homeowner has to pay for a special permit on a simple change.

Ernest Dodd suggested changing the bylaw to apply to the standards as to when the lot was created. Frank Ramsbottom said looking at it on a lot-by-lot basis would require getting into more detail as to when the lot is divided. It might be more of a complication for the Planning Board as how the bylaw is written. He said that Floor Area Ratio could be difficult unless it is gross floor area.

Mark Jones said he thinks Districts would be simpler. One could look it up on a map rather than researching the deeds.

William Byron said at one point we had 1-acre zoning (40,000 sq. ft. builder's acre) and then Town meeting proposed 1 ½ acres. At that meeting someone wanted to change it to two-acres but that didn't pass because it was thought to be snob zoning. Then came cluster zoning that threw a wrench into things. There were several requests for variances in the Wildlife Woods Subdivision (cluster/PCD) for variances to fit a pool onto the lot.

Karen Kelleher suggested, as guidance to the Building Commissioner, that a special permit would not be required for 40,000 sq. ft lots provided the proposed construction meets the setback requirements of the current bylaw. Frank Ramsbottom said he would use some discretion depending on how large an addition is. Ernest Dodd said he could go along with that. Michael Naill said seems to be a reasonable approach. David Hartnagel agrees.

Michael Naill asked, if the ZBA agrees upon a guidance policy for the Building Commissioner, how would we review it if a future Board has a different opinion. Member noted that it would be an administrative change and not a bylaw change.

Karen Kelleher asked if there is consensus to give guidance to the Building Commissioner that a special permit would not be required for 40,000 sq. ft lots provided the proposed construction meets the

setback requirements of the current bylaw, and further provided that there would be nothing preventing something being forwarded to the ZBA if there is any doubt in his mind.

Mark Jones said he admits that the bylaw gives the Building Commissioner great latitude and is comfortable with the bylaw as written, because smaller lots would typically mean encroachment into the setback. He suggested advising that the Building Commissioner has discretion on any lot size recognizing that smaller lots would get into trouble with setbacks and therefore would be referred to the ZBA.

Frank Ramsbottom said the most recent court case was more concerned about mansionization rather than small additions. He said it seems courts are getting picky, and it is really up to what the Town wants. He is comfortable with modest sheds or additions on a particularly large lot. He would not take a carte blanche approach - as long as the town tries to be fair and has good reasoning.

Frank Ramsbottom said the Town of Boxborough has two setbacks, one for the main house and a smaller setback for swimming pools and sheds.

Mark asked Frank Ramsbottom how he would respond to a request if someone has a 1 ½ acre lot and wants to put a shed in 15' from the property line. Frank said he would say they should comply with the setback requirements. He would always advise that any structure should comply with the setback. He would not worry about playground equipment or tree houses. He would require setbacks for things like mechanical equipment for an air conditioner or generator as part of the main structure and that it comply to setback requirements as there is no reason to impact neighbors with sound. He recommends keeping that equipment close the house.

Mark Jones asked if the Town of Acton has a noise bylaw. Frank responded no, and he was grateful for that. They always referred noise complaints to DEP.

Members asked Frank Ramsbottom how he feels about limiting hours of operation. He said, as Building Commissioner, he doesn't want too much discretion. If there is a bylaw, you need to consider the pros and cons when working on a house and when it is reasonable to stop and carry on the next day. In Acton he had a complaint that the builders were using foul language and playing radios. In that instance if it was just hammers banging the neighbor probably wouldn't have been upset. Leonard Golder said he understands the roofing situation as he had a case where the roofers stopped work and house was exposed the weather and suffered property damage. Karen Kelleher noted the ZBA's boiler plate condition gives the Building Commissioner some discretion to accommodate those types of instances.

Leonard Golder asked Frank Ramsbottom about tiny houses. Frank said in another town there was a proposal for tiny houses and there was an issue about how to tie into water and sewer. They are not considered to be a mobile home and there was some issue with the health department concerning water and sewer. It was ultimately resolved. He said in Acton there was a yurt constructed in a back yard. That was considered to be an accessory structure and didn't meet the requirements as a dwelling unit. It was clear, however that they were going to have a friend staying there. Some yurts have indoor plumbing.

Karen Kelleher asked Chairman Mark Jones to restate the ZBA's agreed upon guidance to the Building Commissioner. Mark said the guidance is that the Building Commissioner may use discretion on permits relative to any size non-conforming lot.

Adjournment

At 8:59 pm, **Andrew DeMore** moved to adjourn. *The motion was seconded by Ernest Dodd and carried by a unanimous roll call vote in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Associate Members Andrew DeMore, Leonard Golder and Michael Naill.*

Respectfully submitted,

Karen Kelleher
Administrative Assistant